

# **EXHIBIT B**

Page 1

5 THE KROGER CO.,

6 PLAINTIFF, ::

7 -VS- : CASE NO.: C-1-02-439

8 MALEASE FOODS CORP.,

9 DEFENDANT. ::

10 - - -

11 Deposition of JONATHAN D. LIBBERT, CPA,  
12 CFE, a witness herein, taken by the defendant as  
13 upon cross-examination pursuant to the Federal  
14 Rules of Civil Procedure, and pursuant to agreement  
15 and stipulations hereinafter set forth at the  
16 offices of Frost, Brown & Todd, LLC, 2200 PNC  
17 Center, 201 East Fifth Street, Cincinnati, Ohio at  
18 1:48 p.m. on Wednesday, March 3, 2004, before  
19 Britney L. Fisher, a notary public within and for  
20 the State of Kentucky.

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Page 2		Page 3
1 APPEARANCES:		1 stenotypy by the notary public-court reporter and
2 On behalf of the Plaintiff:		2 transcribed by her out of the presence of the
3 Douglas R. Dennis, Esq.		3 witness; that the jurisdiction of the notary
4 and		4 public-court reporter is waived; and that the
5 Scott D. Phillips, Esq.		5 transcribed deposition is to be submitted to the
6 of		6 witness for his examination and signature, and that
7 Frost, Brown & Todd, LLC		7 signature may be affixed out of the presence of the
8 2200 PNC Center		8 notary public-court reporter.
9 201 East Fifth Street		9 - - -
10 Cincinnati, Ohio 45202		10 I N D E X
11 On behalf of the Defendant:		11 WITNESS CROSS-EXAMINATION
12 Robert W. Cinque, Esq.		12 Jonathan D. Libbert, CPA, CFE 4
13 of		13 - - -
14 Cinque & Cinque, P.C.		14 E X H I B I T S
15 845 Third Avenue		15 DEPOSITION EXHIBITS MARKED
16 New York, New York 10022		16 Y, report of Mr. Libbert. 5
17 - - -		17 - - -
18 S T I P U L A T I O N S		18
19 It is stipulated by and between counsel		19
20 for the respective parties that the deposition of		20
21 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,		21
22 may be taken as upon cross-examination pursuant to		22
23 the Federal Rules of Civil Procedure, and pursuant		23
24 to agreement; that the deposition may be taken in		24
Page 4		Page 5
1 (Witness sworn.)		1 A. \$190.
2 JONATHAN D. LIBBERT, CPA, CFE		2 Q. Bargain. How much have you billed so
3 of lawful age, a witness herein, being first duly		3 far?
4 sworn as hereinafter certified, was examined and		4 A. It's been pretty minimal. I didn't
5 deposed as follows:		5 bring the billing records, but my guess would be
6 CROSS-EXAMINATION		6 six, eight hours.
7 BY MR. CINQUE:		7 Q. And in connection with the
8 Q. Mr. Libbert, who engaged you on		8 preparation of your report, which I happen to have
9 behalf of Kroger?		9 here, we'll mark that as our next exhibit.
10 A. The law firm of Frost, Brown & Todd.		10 (Deposition Exhibit Y was marked for
11 Q. Which person in the law firm?		11 identification.)
12 A. It's been a while, I believe it may		12 BY MR. CINQUE:
13 have been Mr. Phillips.		13 Q. Okay. This is your report, correct?
14 Q. Is this the first time you've done		14 A. Yes.
15 any work with Mr. Phillips' law firm?		15 Q. Who typed it?
16 A. No.		16 A. I did.
17 Q. How many times have you done work		17 Q. So that's your Word processor?
18 with the Frost, Brown firm?		18 A. Yes.
19 A. Probably four or five times.		19 Q. All right. And did you review any
20 Q. And you're receiving a fee of \$175		20 documents in connection with this report?
21 per hour; is that correct?		21 A. Yes.
22 A. Yes, at the time I was engaged. We		22 Q. Okay. What did you look at?
23 update that the first of the year each year.		23 A. Well, it's stated right here in my
24 Q. Well, how much?		24 report I reviewed the complaint, the sale lease

<p style="text-align: right;">Page 6</p> <p>1 back document, and that there were other items that 2 were furnished to me. 3 (Mr. Phillips left the room.) 4 <b>Q. Okay. Now, you state here on the</b> 5 <b>second page or the page with your opinions if the</b> 6 <b>lease for the San Marcos property had been renewed</b> 7 <b>under normal business conditions, basically the</b> 8 <b>rent would have been substantially higher, et</b> 9 <b>cetera. Do you see that?</b> 10 A. Yes. 11 <b>Q. Did you review the lease?</b> 12 A. I believe I did. 13 <b>Q. You believe you did or did you?</b> 14 A. Well, there's a complete copy of my 15 file that's here, we can look at the file. 16 <b>Q. I want to know what you remember?</b> 17 A. I believe that I did. 18 <b>Q. Okay. And what did you determine</b> 19 <b>when you reviewed the lease with respect to this</b> 20 <b>finding?</b> 21 A. There was what I call the original 22 sublease under the renewal for that sublease, that 23 the monthly rent was a little bit over \$8,200 per 24 month.</p>	<p style="text-align: right;">Page 7</p> <p>1 <b>Q. Okay. And, therefore, what did you</b> 2 <b>conclude?</b> 3 A. That beginning April 1st of 2003 4 there was an additional agreement between Kroger 5 and the H.E. Butt Company that provided for the 6 payment of \$48,125 per month. 7 <b>Q. Okay. So that's almost a reduction</b> 8 <b>of 50 percent, correct?</b> 9 A. It's probably about 40 percent. 10 <b>Q. Okay.</b> 11 A. I think it's closer to 50, but my 12 arithmetic may be wrong. 13 <b>Q. And what was the reason for that</b> 14 <b>reduced rent?</b> 15 A. It was my understanding that this was 16 in recognition of, I'll call it, the deal to sell 17 the property not being able to be closed. 18 <b>Q. What's the basis of your</b> 19 <b>understanding?</b> 20 A. The basis was conversations with 21 people from Kroger. 22 (Mr. Phillips entered the room.) 23 <b>Q. Which people?</b> 24 A. Primarily Ed Waldvogel.</p>
<p style="text-align: right;">Page 8</p> <p>1 <b>Q. What did he tell you?</b> 2 A. He told me that was the reason why 3 they reduced the rent. 4 <b>Q. What did he say?</b> 5 A. I think I just answered that. 6 <b>Q. You can answer it again. I don't</b> 7 <b>know that I heard your answer entirely, but go</b> 8 <b>ahead.</b> 9 A. He said that's the reason the rent 10 was reduced, because as it states right here on the 11 document failure -- decrease in rent due to failure 12 to close. 13 <b>Q. So you're basing your opinion on</b> 14 <b>information that Waldvogel gave you; is that</b> 15 <b>correct?</b> 16 A. Well, I did review the documents 17 myself as well. 18 <b>Q. Okay. And did your review of the</b> 19 <b>documents furnish you with any information that you</b> 20 <b>used in your conclusion?</b> 21 A. Well, it was a result of all of the 22 work that I've done, both the conversation and the 23 review of the documents. 24 <b>Q. Okay. Is there anything in the</b></p>	<p style="text-align: right;">Page 9</p> <p>1 <b>document that led you to believe that the reason</b> 2 <b>the rent was reduced was dependency of the</b> 3 <b>transaction?</b> 4 A. I would have to go back and look at 5 the document. 6 <b>Q. Go ahead.</b> 7 THE WITNESS: Do we have it here? 8 MR. PHILLIPS: Yeah. 9 THE WITNESS: Are these the 10 documents from my file? 11 MR. DENNIS: I think so. 12 THE WITNESS: I don't see the 13 document I'm looking for here. 14 (Mr. Phillips left the room.) 15 BY MR. CINQUE: 16 <b>Q. What document are you looking for?</b> 17 A. I'm looking for the document that was 18 the agreement effective April 1st, 2003. 19 <b>Q. Is that something that you looked at</b> 20 <b>to form the basis for your conclusion about the</b> 21 <b>reduction in rent?</b> 22 A. That was one of the documents that I 23 looked at, yes. 24 <b>Q. You don't have it here?</b></p>

<p>1        A. I don't see it here.</p> <p>2        Q. Okay. The annual threshold rate that</p> <p>3 you reflect on your report, did you put those</p> <p>4 quotations around threshold?</p> <p>5        A. Yes.</p> <p>6        Q. Why did you do that?</p> <p>7        A. That's the terminology that Mr.</p> <p>8 Waldvogel used.</p> <p>9        Q. What does it mean?</p> <p>10       A. Well, it can mean a couple of</p> <p>11 different things.</p> <p>12       Q. What did it mean to you in your</p> <p>13 report?</p> <p>14       A. The rate that was used here was an</p> <p>15 attempt to kind of hit the middle ground between</p> <p>16 what Kroger would use when they invested the money</p> <p>17 to build new properties, and the rates that they</p> <p>18 were paying on current debt.</p> <p>19       Q. Twelve percent, is that what you're</p> <p>20 saying?</p> <p>21       A. That's the number that's on this</p> <p>22 piece of paper.</p> <p>23       Q. I'm trying to understand. Explain</p> <p>24 the relationship between the so-called threshold</p>	<p>Page 10</p> <p>1        <b>rate and any calculations to which it applies?</b></p> <p>2        A. Well, once again, the 12 percent is</p> <p>3 sort of the middle ground between what Kroger</p> <p>4 normally would achieve in investing new money,</p> <p>5 which I believe is around 18 percent.</p> <p>6        Q. So you're basing your conclusion on</p> <p>7 the fact that invariably when Kroger has money to</p> <p>8 invest, it earns a yield of what?</p> <p>9        A. Well, they have told me it was 18</p> <p>10 percent.</p> <p>11       Q. Did you do anything to independently</p> <p>12 verify that?</p> <p>13       A. Not at this time.</p> <p>14       Q. Okay. Now, you use the figure \$11</p> <p>15 million, do you see that?</p> <p>16       A. Yes.</p> <p>17       Q. Where did you get that figure?</p> <p>18       A. I believe that was from a document</p> <p>19 for the sale of that property. I believe there</p> <p>20 were three different properties in the sale</p> <p>21 agreement, and each price was spelled out</p> <p>22 separately.</p> <p>23       Q. Did somebody give you that number or</p> <p>24 did you find it somewhere?</p>
<p>1        A. I think both. I think somebody gave</p> <p>2 it to me and it was in the documents.</p> <p>3        Q. And who's that someone, Waldvogel?</p> <p>4        A. Yes.</p> <p>5        Q. Now, the \$11 million figure, what</p> <p>6 does that represent?</p> <p>7        A. I was told that was the selling price</p> <p>8 of the warehouse in San Marcos, Texas.</p> <p>9        Q. Did you factor in any income tax</p> <p>10 consequences in any of these calculations?</p> <p>11       A. No.</p> <p>12       Q. So the way you did this is you</p> <p>13 assumed that, if it sold for \$11 million, Kroger</p> <p>14 would have the \$11 million available for</p> <p>15 investment; is that correct?</p> <p>16       A. Yes.</p> <p>17       Q. Why didn't you consider income tax</p> <p>18 consequences?</p> <p>19       A. I didn't think it was appropriate.</p> <p>20       Q. And what made you not think it was</p> <p>21 appropriate?</p> <p>22       A. If Kroger had been able to sell this</p> <p>23 warehouse when they thought they were going to,</p> <p>24 they would have had the \$11 million in cash. And</p>	<p>Page 12</p> <p>1        they would have been able to invest that money or</p> <p>2 to pay off the existing debt.</p> <p>3        Q. And when was this money to be</p> <p>4 available to Kroger as you've just described it?</p> <p>5        A. I believe it would have been some</p> <p>6 time around April 1st of 2003.</p> <p>7        Q. And we're sitting here in the</p> <p>8 beginning of March of 2004, are there any income</p> <p>9 tax consequences involved in the receipt of that</p> <p>10 \$11 million, as you sit here today?</p> <p>11       A. I'm not a tax expert, but I'm sure</p> <p>12 there would be.</p> <p>13       Q. Okay. You didn't factor in anything</p> <p>14 for income tax one way or the other, correct?</p> <p>15       A. That's correct.</p> <p>16       Q. In your experience has Kroger ever</p> <p>17 lost any money on any investment its ever made?</p> <p>18       A. I've never had any previous dealings</p> <p>19 with Kroger.</p> <p>20       Q. So what is your assumption then that</p> <p>21 Kroger would have earned how much on \$11 million,</p> <p>22 is it 12 percent?</p> <p>23       A. Yes, it is.</p> <p>24       Q. Okay. And that's based simply upon</p>

<p>1 the discussion you had with Waldvogel, correct?  2 A. Primarily, yes.  3 MR. CINQUE: All right. That's all  4 I have for the witness.  5 MR. DENNIS: Okay.  6 MR. CINQUE: Thank you.</p> <p>7 8 9 10 11 JONATHAN D. LIBBERT, CPA, CFE 12 - - - 13 DEPOSITION CONCLUDED AT 2:03 P.M. 14 - - - 15 16 17 18 19 20 21 22 23 24</p>	<p>Page 14</p> <p>1 C E R T I F I C A T E  2 STATE OF KENTUCKY:  3 : SS  4 STATE AT LARGE :  5 I, BRITNEY L. FISHER, the undersigned, a duly  6 qualified and commissioned notary public within and  7 for the State of Kentucky, do hereby certify that  8 before the giving of his aforesaid deposition, the  9 said JONATHAN D. LIBBERT, CPA, CFE was by me first  10 duly sworn to tell the truth, the whole truth and  11 nothing but the truth; that the foregoing is the  12 deposition given at said time and place by the said  13 JONATHAN D. LIBBERT, CPA, CFE; that said deposition  14 was taken in all respects pursuant to agreement;  15 that said deposition was taken by me in stenotypy  16 and transcribed by computer-aided transcription  17 under my supervision; that the transcribed  18 deposition is to be submitted to the witness for  19 his examination and signature; that I am neither a  20 relative of nor attorney for any of the parties to  21 this cause, nor relative of nor employee for any of  22 their counsel, and have no interest whatever in the  23 result of the action.</p> <p>24</p>
<p>1 IN WITNESS WHEREOF, I hereunto set my hand  2 and official seal of office at Cincinnati, Ohio,  3 this day of , 2004.</p> <p>4 5 6 7 MY COMMISSION EXPIRES: BRITNEY L. FISHER  8 JULY 3, 2005. NOTARY PUBLIC-STATE OF  9 KENTUCKY</p> <p>10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p>Page 16</p> <p>1 UNITED STATES DISTRICT COURT  2 SOUTHERN DISTRICT OF OHIO  3 : WESTERN DIVISION  4 THE KROGER CO., :  5 -VS- : CASE NO. C-1-02-439  6 MALEASE FOODS CORP., :  7 DEFENDANT.:  8  9 Britney L. Fisher, a court reporter, first  10 duly cautioned and sworn, testifies and affirms  11 that JONATHAN D. LIBBERT, CPA, CFE, a witness  12 herein, was notified that the transcript was ready  13 for review and signature on Wednesday, March 17,  14 2004, by forwarding a copy of the transcript  15 to Mr. Scott Phillips, Esq.  16 Within thirty-one days (pursuant to Rule  17 (30)E of the Federal Rules of Civil Procedure),  18 JONATHAN D. LIBBERT, CPA, CFE, a witness herein,  19 did not present signature of said deposition.  20 The original transcript is now being  21 tendered into the hands of Mr. Robert W. Cinque,  22 Esq.  23 Further affiant sayeth naught.  24  25  26  27  28  29  30  31  32  33  34  35  36  37  38  39  40  41  42  43  44  45  46  47  48  49  50  51  52  53  54  55  56  57  58  59  60  61  62  63  64  65  66  67  68  69  70  71  72  73  74  75  76  77  78  79  80  81  82  83  84  85  86  87  88  89  90  91  92  93  94  95  96  97  98  99  100  101  102  103  104  105  106  107  108  109  110  111  112  113  114  115  116  117  118  119  120  121  122  123  124  125  126  127  128  129  130  131  132  133  134  135  136  137  138  139  140  141  142  143  144  145  146  147  148  149  150  151  152  153  154  155  156  157  158  159  160  161  162  163  164  165  166  167  168  169  170  171  172  173  174  175  176  177  178  179  180  181  182  183  184  185  186  187  188  189  190  191  192  193  194  195  196  197  198  199  200  201  202  203  204  205  206  207  208  209  210  211  212  213  214  215  216  217  218  219  220  221  222  223  224  225  226  227  228 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